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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Extrajudicial, summary or arbitrary executions

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report on the worldwide situation in regard to extrajudicial, summary or arbitrary executions submitted by Philip Alston, Special Rapporteur, in accordance with paragraph 20 of General Assembly resolution 59/197.

Summary

This report is submitted pursuant to General Assembly resolution 59/197. In its first part the Special Rapporteur reviews the situation of country visits requested and replies received thereto. He concludes that the prolonged lack of a positive reply by numerous countries, including members of the Human Rights Council, is deeply problematic. The Special Rapporteur then reviews developments in the two countries he visited in the course of 2005, Nigeria and Sri Lanka. He concludes, inter alia, that there is an urgent need for a robust international human rights monitoring mission in Sri Lanka.

The second part of the report deals with substantive issues of relevance to the mandate, elaborating on principles of international law that are applicable to numerous cases raised by the Special Rapporteur in communications with Governments. The Special Rapporteur explores the standards applicable to the use of lethal force by law enforcement officials, explaining the role of the twin principles of proportionality and necessity, and highlighting the interplay between customary law, treaty law and so-called soft law standards in this respect. He also explains the

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central concept of due diligence obligations, both with respect to the recently adopted International Convention on the Protection of All Persons from Enforced Disappearance and to deaths in custody. Finally, the Special Rapporteur discusses problems raised by certain legal doctrines that enhance the role of victims in death penalty cases, both in the decision on whether capital punishment should be executed and in the actual execution.

The Special Rapporteur's recommendations to the General Assembly concern country visits, the need to investigate the killings in Gaza, Israel and Lebanon since June 2006, and international human rights monitoring in Sri Lanka.

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I. Introduction

1. This report to the General Assembly does not deal with all aspects of the work currently under way in connection with the mandate of the Special Rapporteur.[1] Instead, the focus is on reporting about in situ visits already undertaken or requested and on exploring some of the most significant issues that have arisen in the implementation of the mandate. These include the legal framework of accountability for extrajudicial executions, with particular emphasis on the role of "soft law" standards. That role is illustrated by reference to the principles governing the use of lethal force by law enforcement officials and the evolution and codification of the concept of due diligence. Finally, attention is drawn to the complexity of seeking to reconcile the responsibilities of States with efforts to empower victims in the context of extrajudicial executions.

2. In the preparation of this report I am grateful to the staff of the Office of the High Commissioner for Human Rights for their assistance, and to William Abresch, Director of the Project on Extrajudicial Executions based at the New York University School of Law, who has provided first-rate assistance and advice.

II. Visits

3. The system of on-site country visits is an indispensable component of the special procedures operating under the auspices of the Human Rights Council. Those procedures are, in turn, crucial to the credibility of the Council and of the United Nations as a whole in demonstrating a capacity to respond effectively, systematically and even-handedly to violations of human rights. It is, however, a system which is close to crisis, at least in so far as visits to investigate issues of extrajudicial executions[2] are concerned.

A. Visits requested: a system close to crisis

4. As of August 2006 I had requested visits to 22 countries and the Occupied Palestinian Territories. Of those 22, only three countries — Guatemala, Lebanon and Peru — have actually proceeded with plans for a visit. The visit to Guatemala is scheduled for August 2006, the visit to Lebanon was postponed for security reasons and the visit to Peru was postponed for technical reasons. The Palestinian Authority has issued an invitation.

5. The responses of the remaining 19 countries have ranged from complete silence, through formal acknowledgement, to acceptance in principle but without meaningful follow-up.[3] In light of the undertakings offered in connection with the recent elections to the Human Rights Council it is especially noteworthy that eight Council members have failed to issue requested invitations: Bangladesh, China, India, Indonesia, Pakistan, the Philippines, the Russian Federation, and Saudi

[1] An overview of my terms of reference, a list of the specific types of violations of the right to life upon which action has been taken, and a description of the legal framework and methods of work used in implementing the mandate can be found in E/CN.4/2005/7, paras. 5-12.

[2] I use the term "extrajudicial executions" to refer to executions other than those carried out by the State in conformity with the law, thus including "summary" and "arbitrary" executions.

[3] The precise details are contained in E/CN.4/2006/53, para. 17.

Arabia. In some cases the relevant requests were first made some six years ago. Another State has issued a "standing invitation" to the special procedures — the Islamic Republic of Iran — but has repeatedly failed to respond to requests that dates for a visit be set, despite several meetings and an extensive correspondence. The remaining States with outstanding requests are: El Salvador, Israel, Kenya, the Lao People's Democratic Republic, Nepal, Thailand, Togo, Uganda, Uzbekistan and Viet Nam. It is recommended below that the General Assembly take steps to address this deeply problematic situation.

6. The crisis in Lebanon, Israel and the Occupied Palestinian Territories has also been a major concern. A visit to the Gaza Strip and Israel was requested on 16 June 2006. The Palestinian Authority agreed on 3 July 2006, but Israel has not replied. On 19 July 2006 a further request was addressed to Lebanon and Israel. The Government of Lebanon issued an invitation on 28 July 2006 but no response has been received from Israel. On 2 August 2006, and after consultation with the President of the Human Rights Council I and three other mandate holders made a joint request to which Lebanon responded affirmatively on 3 August 2006; Israel did not respond. A joint mission to Beirut starting on 7 August was subsequently postponed due to the deterioration of the security situation in the region. In view of the scale of civilian deaths involved and the extent to which relevant rules of human rights and humanitarian law have been invoked, a thorough and systematic evaluation of allegations concerning extrajudicial executions will be indispensable.

B. Updates on visits undertaken

1. Nigeria

7. I visited Nigeria in June/July 2005 and met with senior federal government officials, three state governors, representatives of civil society and many others. My report concluded that serious problems exist in relation to extrajudicial executions carried out by the police, security forces and vigilante groups. It called for major reforms affecting many organs of Nigerian society.[4] Since my visit, there has been no official response from the Government to my report. A number of encouraging reforms have, however, been pursued following the findings of the Goodluck Commission established in the wake of the killing of the Apo 6 that immediately preceded my visit. According to reports these include the establishment of a Presidential Commission on police reform in Nigeria, revitalization of the forensic and fingerprinting capacities of the Nigeria Police,[5] the payment of compensation to the victims of police killing in the Apo case[6] and the prosecution of police officers for the killings.

8. The overall situation, however, has deteriorated in some significant respects and there is a widely held perception that "the international community has been conspicuously silent about human rights abuses since civilian government was restored."[7] The need for action has been underscored by growing tensions in the

[4] See E/CN.4/2006/53/Add.4.

[5] See remarks by Innocent Chukwuma of CLEEN available at http://www.cleen.org/launching%20of%20opportunity%20for%20justice.pdf.

[6] "Apo 6: FG pays N3m to each family", in *Vanguard*, available at http://www.vanguardngr.com/articles/2002/nationalx/nr203122005.html.

[7] "Nigeria: Want in the Midst of Plenty", International Crisis Group, *Africa Report* No. 113, 19 July 2006, p. 27.

Niger Delta region, including the emergence of a new vigilante group, the Movement for the Emancipation of the Niger Delta (MEND), which has been accused of kidnappings, attacks on government forces, sabotage of oil installations, and threats to disrupt the future flow of oil.[8] While the principal bone of contention is the control of mineral resources and resulting revenues, the issues highlighted in my report also remain central to establishing an ethos of transparency and accountability and ending abuses by the police and security forces.

9. There are a number of steps which the Government of Nigeria should undertake as a matter of urgency. They include:

(a) The removal of armed robbery as a capital offence;

(b) Amendment of Police Order No. 237 which currently gives the police an almost unlimited capacity to shoot and kill alleged suspects;

(c) The establishment of a National Registry of all persons killed at the hands of the police each year;

(d) Formally acknowledging the incompatibility with both the Federal Constitution and Nigeria's human rights obligations of State laws imposing the death penalty for offences such as sodomy and adultery; and

(e) Immediate commutation of the death sentence of every prisoner who has served more than five years in conditions on death row, which are generally scandalously unsatisfactory.[9]

2. Sri Lanka

1. The human rights situation

10. I visited Sri Lanka in November/December 2005 and met with government officials, members of civil society and representatives of the Liberation Tigers of Tamil Eelam (LTTE).[10] The conflict in Sri Lanka is complex, but its outline may be briefly summarized.[11] LTTE began fighting the Government in the late 1970s with the aim of establishing a State of Tamil Eelam in the north and east of the island. In February 2002, the Government and LTTE had signed the Ceasefire Agreement (CFA) brokered by the Government of Norway. In March 2004 the LTTE Eastern Province commander, Colonel Karuna, split with the LTTE leadership, initially taking with him perhaps one fourth of the LTTE cadres. The "Karuna group" has since killed many LTTE cadres and supporters. Attacks on government forces that occurred during my visit placed CFA under unprecedented stress. Three weeks later the Sri Lanka Monitoring Mission warned that "war may not be far away", and subsequent events have only intensified this perception.[12] At times like this, it is often argued that respect for human rights must await the emergence of political or military solutions. My findings suggest, however, that many of the killings taking

[8] See generally "The Swamps of Insurgency: Nigeria's Delta Unrest", International Crisis Group, *Africa Report* No. 115, 3 August 2006.

[9] See "Presidential Commission Laments State of Prisons", *This Day*, 22 June 2006.

[10] See E/CN.4/2006/53/Add.5.

[11] A more thorough analysis is at E/CN.4/2006/53/Add.5, paras. 7-23.

[12] SLMM, press release of 29 December 2005.

place in Sri Lanka are best characterized as human rights violations and best addressed through human rights implementation and monitoring.

11. Civilians are not simply "caught in the crossfire" of this conflict: rather, it involves the intentional targeting of both combatants and civilians, and attacks on both have increased sharply since my visit. From 2002 to 2005, when compliance with CFA was fairly strong, relatively few people were killed each year. As of August 2006, the rate of killing has increased dramatically and some estimates predict a toll of at least 1,200 persons in 2006 if current trends persist. While a full-scale war has thus far been averted, a historical perspective reveals the distinct possibility of further escalation. Up until February 2002, the conflict-related death toll in Sri Lanka was roughly 60,000 people. It would be truly tragic if the past were reprised, especially because the current violence has no potential to lay the groundwork for a future political settlement.

12. The conflict between the Government and LTTE is ultimately a struggle for legitimacy, not territory. The conflict has no military solution, and mere adjustment of the facts on the ground will not fundamentally change either party's position in future negotiations. The hopes of LTTE for autonomy or independence rest on persuading the domestic and international communities that this would be the best solution in human rights terms. However, LTTE has a record of using killings to deter civilians from exercising the freedoms of expression, movement, association, and participation in public affairs.[13] As it stands, no outside observer could wish rule by LTTE on the entire Tamil community, much less on the Sinhalese and the Muslims.[14]

13. The Government should not, however, interpret the widespread proscription of LTTE as a terrorist organization as an endorsement of its own record.[15] Neither its past nor its present conduct would justify great faith in its ability to respect equally the rights of all citizens. Indeed, it is an enduring scandal that there have been virtually no convictions of government officials for killing Tamils,[16] and many Tamils doubt that the rule of law will protect their lives.

14. A resolution of this conflict that would merit the international community's endorsement will require the Government, LTTE, or both, to demonstrate genuine

[13] These civilians may be loosely grouped into two categories, equally deserving of protection. Some are ordinary individuals who have refused to give money, challenged the recruitment of their children, been a little too outspoken, or simply been in the wrong place at the wrong time. Other civilians have been targeted for their membership in or support for political parties opposed by LTTE. Such killings are apparently conducted to reinforce the self-proclaimed role of LTTE as the "sole representative" of the Tamil people. See E/CN.4/2006/53/Add.5, paras. 11-13, 21-23.

[14] The international community will never support a solution that involves de facto ethnic cleansing or the suppression of minority rights. Levels of support for LTTE among Tamils are thus not dispositive.

[15] When the European Union listed LTTE as a terrorist organization, it also emphasized that it was aware that "[t]he upsurge in violence is not caused by the LTTE alone" and "note[d] with concern the growing number of reports of extrajudicial killings". It "strongly urge[d] the Sri Lankan authorities to curb violence in Government-controlled areas" and to "investigate and prosecute all cases of violence that have so far not resulted in arrests or convictions" (Council of the European Union, Declaration by the Presidency on behalf of the European Union concerning listing of LTTE as a terrorist organization, 31 May 2006).

[16] Most of my interlocutors could recall only one such case (Krishanthy). See E/CN.4/2006/53/Add.5, paras. 50-61.

respect for human rights. This is reinforced by the notion, endorsed by the General Assembly, that there is a "responsibility to protect".[17]

15. The strategic importance of achieving and maintaining international legitimacy grounded in respect for human rights is not completely lost on either the Government or LTTE. Indeed, the discourse of human rights is central to the parties' own understandings of the conflict's origins and conduct. Many Tamils, whether or not supportive of LTTE, view the massacres of July 1983 as a legitimate cause for the militarization of Tamil nationalism.

16. When seeking international legitimacy, parties to a conflict can either respect human rights and humanitarian law or can cover up abuses. The conflict in Sri Lanka exhibits aspects of both strategies. Both main parties have shown some restraint, committing human rights abuses that are less pervasive and barbaric than those seen in some recent conflicts. On the other hand, both also violate human rights and humanitarian law while attempting to avoid the loss of legitimacy by committing abuses in a manner that permits them maximum deniability. In Sri Lanka, no one claims responsibility for any violence short of a pitched battle. Indeed, proxies,[18] the subversion of accountability mechanisms and disinformation are used to undermine efforts by objective observers to reach compelling conclusions as to responsibility for particular abuses. It is the possibility of employing a strategy of deniability in order to simulate respect for human rights that must be foreclosed so as to pressure the Government and LTTE to seek legitimacy through actual respect for human rights.

17. Precisely because the struggle for legitimacy, including international legitimacy, is so central to this conflict, the international community is exceptionally well positioned to contribute to its amelioration and, ultimately, to its resolution. Thus the critical need is for international human rights monitoring that would definitively identify those responsible for abuses. Effective monitoring would stand a real chance of inducing genuine rather than simulated respect for human rights. Such respect — worthwhile in its own right — would, in turn, also create an environment in which the country's communities might be able to envision a future in which they did not fear peace as well as war.

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[17] General Assembly resolution 60/1, paras. 138 and 139.

[18] I noted in my report that there is strong circumstantial evidence of (at least) informal cooperation between government forces and members of the Karuna group (E/CN.4/2006/53/Add.5, paras. 14-19 and 49). LTTE has attributed a number of killings to individual Tamil civilians or to ephemeral groups, some of which may have received civil defence training from LTTE (E/CN.4/2006/53/Add.5, para. 20). One small but noteworthy positive sign with respect to accountability was the strong denunciation by LTTE of a recent attack: "LTTE condemns this attack on the civilian bus. Directly targeting civilians, as the Kebitigowella claymore attack has, cannot be justified under any circumstances." The Liberation Tigers of Tamil Eelam Peace Secretariat, press release of 15 June 2006. While not clarifying the responsibility of any party, this denunciation does demonstrate an important evolution in the acceptance by LTTE of its moral responsibility to denounce attacks on civilians. When I spoke with Mr. Thamilchelvan, chief of the LTTE political wing, in December, he categorically refused to denounce particular attacks as incompatible with the role of LTTE as a people's movement (E/CN.4/2006/53/Add.5, para. 48).

2. The urgent need for international human rights monitoring

18. When I visited Sri Lanka, there was a near universal consensus that more effective human rights monitoring was required, but there was considerable disagreement regarding the appropriate mechanism for achieving this.[19] It was generally understood that no domestic mechanism could respond effectively to conflict-related killings, and that remains the case today. Most interlocutors from civil society thought that a United Nations monitoring mission would be the most effective mechanism, in light of the Organization's established expertise in human rights monitoring and lack of political involvement in the peace process. In contrast, government officials and representatives of LTTE expressed their shared preference for strengthening the Sri Lanka Monitoring Mission (SLMM), the body established by CFA to monitor ceasefire compliance, rather than introducing an additional monitoring mechanism focused on human rights compliance.

19. My conclusion at that time was that SLMM could be strengthened in ways that would permit it to provide relatively effective human rights monitoring.[20] The institutional capacity of SLMM to play this role was subsequently demonstrated in at least some measure. Following my visit, the Government of Norway and SLMM took various actions that represented a real attempt to play a more effective role in responding to human rights violations. In March 2006, Major General Ulf Henricsson of Sweden was appointed Head of Mission of SLMM, reducing Norway's conflict of interest between providing accountability for violations and advancing the peace process. In April 2006, SLMM began to exhibit a greater concern with violence directed against civilians, referring for the first time to the "extrajudicial killings of civilians".[21] The creativity of the Government of Norway and the increasing assertiveness of SLMM on behalf of human rights are truly commendable; however, for reasons beyond their control, the insufficiency of SLMM to meet the need for human rights monitoring in Sri Lanka is now evident. SLMM was never going to be a perfect human rights monitoring mechanism, but today even the opportunity for it to serve as a "second best" option may be passing.

20. The fundamental reason for SLMM is that it exists at the mercy of the parties. At the time of writing, CFA remains in force. However, the Government or LTTE could elect to unilaterally terminate CFA at any time, thus withdrawing the mandate of SLMM.[22] Regardless whether CFA comes to be terminated, the ability of SLMM to conduct monitoring has been gravely undermined. In particular, SLMM has been severely weakened by the decision of LTTE to insist on the withdrawal of monitors who are nationals of EU member States, thereby cutting the SLMM's strength by two thirds.

21. In my report, I observed that, "From a human rights perspective, the goal of strengthening SLMM's human rights role is clearly not sufficient in itself in the medium-term. For pragmatic reasons it seems to be the best interim measure, but before long significantly more will be needed. If the ceasefire fails, and that now appears to be an all too real possibility, the SLMM's role will be in question and there will be an urgent and pressing need to establish a full-fledged international

[19] See E/CN.4/2006/53/Add.5, paras. 38-47.

[20] I recommended a number of particular reforms. See E/CN.4/2006/53/Add.5, para. 72.

[21] SLMM, press release of 29 April 2006.

[22] CFA, art. 4.4.

human rights monitoring mission."[23] That time has come. There is today an urgent need for an international human rights monitoring mission for Sri Lanka.

22. It is thus appropriate to reiterate some of the requirements for effective monitoring in the particular situation of Sri Lanka today:

- The details of alleged incidents, the results of investigation, and the basis for the monitoring mission's determination of responsibility should be made public (even if information is redacted to protect individuals).
- The investigative process should be designed to prioritize the protection of witnesses against intimidation and violence.
- The mandate of the monitoring mission should not be geographically limited, inasmuch as conflict-related human rights violations occur throughout the country.
- Because a key purpose of monitoring is to limit the possibility of conducting deniable human rights abuses, the monitoring mission should command a high level of investigative and forensic capacity. This requires, inter alia, persons with police training, persons with medical training, and Sinhala and Tamil interpreters.
- The monitoring mission should be independent of any peace process. Two implications of this are that:
  - Regardless whether CFA remains in force, the monitoring mission should not be called upon to investigate violations of CFA. The distinction between violations of human rights and humanitarian law, on the one hand, and of violations of a ceasefire agreement, on the other, must be preserved;
  - The monitoring mission should report to a neutral body.

23. This list should not be considered remotely comprehensive. In particular, the design of any monitoring mission must draw upon the lessons learned from past initiatives. The intention of this list is simply to highlight certain requirements for effective monitoring that are specific to Sri Lanka in light of the dynamics and logic of human rights abuse in that country. The United Nations would be well situated to establish a mission fulfilling these requirements.

3. The undermining of independent oversight bodies

24. While my report was critical of the Government's near-complete failure to prosecute or even discipline members of the security forces who commit extrajudicial executions, I credited the Government with taking an important step towards accountability by constitutionally guaranteeing the independence of key oversight bodies, including the National Human Rights Commission (HRC) and the National Police Commission (NPC). I reported that, however, the constitutionally granted authority of NPC to reform the police force had already been challenged by the Inspector General of Police (IGP) and that NPC had received relatively little support from other political actors in this turf war. I noted that, "While most members of civil society and Government that I talked with had favourable

[23] E/CN.4/2006/53/Add.5, para. 47.

impressions of NPC's efforts thus far, some also feared that, in struggling to insulate the police from politics, it would fall victim to politics itself".[24] Since my visit, HRC and NPC have both fallen victim to politics.

25. The very concept of a body designed to oversee the conduct of the executive branch of Government is that it be independent of that branch. The mechanism for appointments to HRC and NPC laid out in the Seventeenth Amendment to the Constitution was designed to ensure such independence. Under its provisions, there are two stages of appointments. First, various political actors, including parties in opposition, are permitted to select members of the Constitutional Council. The Constitutional Council, in turn, selects the members of various bodies, including HRC and NPC.

26. The Constitutional Council has not operated since a controversy over who has the authority to select one of its members erupted in March 2005. When the terms of the commissioners of NPC and HRC ended, in November 2005 and April 2006, respectively, those bodies became defunct. The President has subsequently selected and appointed individuals to HRC and NPC, circumventing the procedure specified by the Seventeenth Amendment.

27. Numerous domestic actors have argued that for the Constitutional Council to carry out its duties despite the failure to appoint one of its members would comply with the constitutional procedure. It is not, however, my place to try to resolve a domestic constitutional crisis. But it does seem essential to stress the incompatibility of the current "solution" with international standards.[25] There is no worse means by which to ensure an oversight body's independence from the executive than for the executive to directly appoint its members. Similarly, the appointment of a Cabinet-level Minister for Disaster Management and Human Rights cannot, despite some clear achievements on the part of the Minister, be considered to substitute for independent human rights oversight.

4. The role of the diaspora

28. In my report, I argued that the Sri Lankan diaspora has a responsibility to use its considerable political and financial influence and funding to promote and to insist upon respect for human rights, and the report recommended that Governments with a significant diaspora population "should enter into serious dialogue with those communities in light of the findings in this report".[26]

29. I have since taken steps to stimulate such a dialogue. At the time of writing, I have had my report translated into Tamil and I hope that a Sinhala translation will be completed by the time this report comes before the General Assembly.[27] In August 2006, I spoke at a public meeting in London attended by a broad cross-

[24] Ibid., para. 64.

[25] See e.g. Principles relating to the status of national institutions for the promotion and protection of human rights (The Paris Principles), General Assembly resolution 48/134 of 20 December 1993; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Economic and Social Council resolution 1989/65 of 24 May 1989.

[26] E/CN.4/2006/53/Add.5, para. 89.

[27] The Tamil translation is available at http://www.extrajudicialexecutions.org/reports/translations/Tamil_E_CN_4_2006_53_Add_5.pdf. Once completed, the Sinhala translation will also be available on the same website. These are unofficial translations.

section of the diaspora and was heartened by the range of questions and comments that I received.

III. Developing the legal framework of accountability for extrajudicial executions

30. Most international human rights norms are, by their very nature, stated in broad and somewhat open-ended terms. It thus falls to various interpretative institutions established at the national and international levels to undertake the process of elaborating upon the content and requirements of the relevant standards so that they are capable of providing practical guidance in specific contexts. An important function of the Special Rapporteur is to assist this process. The present analysis thus seeks to shed some light on key issues.

A. The evolving human rights regime and the role of "soft law" standards

31. The international legal regime applicable to extrajudicial executions is ultimately grounded in norms of customary international law, the Universal Declaration of Human Rights and the provisions of widely ratified international treaties. While the direct applicability of the last will vary from country to country according to its record of ratification, it remains the case that there is a significant influence exerted by non-universally ratified treaty norms and by "soft law" standards in the shaping and interpretation of the basic regime. This is not to suggest that all relevant norms, whether formally accepted or not by a given country, are nevertheless applicable to it. This is patently not the case, but it is important to acknowledge that the formation and evolution of international human rights norms are not black and white or unidimensional processes. Just as the Standard Minimum Rules for the Treatment of Prisoners exerted considerable and systematic influence before they became an accepted part of customary international law, so too do various bodies of principles that have been adopted by United Nations bodies such as the Economic and Social Council and the General Assembly exert a significant influence over the interpretative context which operates today in relation to situations involving extrajudicial executions. In other words, the jump from the status of a declaratory but non-binding declaration or statement of principles or guidelines to that of a customary norm is a gradual and often imperceptible process. It is this process which gives salience to the key aids to interpretation which are regularly invoked by United Nations human rights bodies and other institutional arrangements entrusted with the interpretation and application of human rights standards.

32. In order to illustrate these processes the following sections of this report provide two case studies. One concerns the use of lethal force by law enforcement officials, illustrating how non-binding principles can assist in determining the content of binding rules. The second concerns the concept of due diligence and notes its evolution from a principle enunciated by human rights courts to one which is now firmly entrenched in treaty law.

B. Case study: the use of lethal force by law enforcement officials

33. One issue frequently underscored in communications that I have sent to Governments is that of the lethal use of force by law enforcement officials. My report on Nigeria provides a compelling example of what happens when the rules governing such situations are inconsistent with the fundamental principles reflected in the basic international norms, as elaborated upon in standards originally adopted on a non-binding basis.[28] Nigeria's standing "rules for guidance in use of firearms by the police" (Police Order No. 237) authorize the use of firearms if a police officer cannot "by any other means" arrest or rearrest any person who is suspected (or has already been convicted) of an offence punishable by death or at least seven years' imprisonment. The rules which elaborate upon this provision are even more permissive. They note that any person who seeks to escape from lawful custody commits a felony warranting a seven-year sentence. As a result shooting to kill someone charged with stealing goods of negligible value would be justified if the person were alleged to be escaping from custody. The only qualification contained in the rules is that "firearms should only be used if there are no other means of effecting his arrest, and the circumstances are such that his subsequent arrest is unlikely".

34. These rules attempt to codify the principle of necessity, but completely ignore the principle of proportionality which, as we shall see below, constitute the twin pillars of international law in this area. Rather than permitting the intentional lethal use of force only "in order to protect life", these rules permit deliberate killing even to prevent the possible repetition of minor thefts. The consequences in relation to armed robbery — a capital offence in Nigeria — have been devastating. According to official statistics, 2,402 armed robbers have been killed by the police since 2000. (In 2004, one "armed robber" was killed for every six reported armed robberies.) While many of these were executions that would not have satisfied even the principle of necessity, it is the inadequacy of the rules on proportionality that makes the pretext of a fleeing armed robber available. Another example from Nigeria illuminates the human consequences of failing to properly incorporate international standards on necessity into domestic rules on the use of lethal force. In "operation fire-for-fire", a 2002 campaign against crime, the Inspector-General of Police pre-authorized police officers to fire in "very difficult situations". The result, revealed in police statistics, was that in the first 100 days, 225 suspected criminals were killed, along with 41 innocent bystanders.

35. The principles of international human rights law applicable in such contexts draw significantly upon the Code of Conduct for Law Enforcement Officials[29] and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[30] Each of these instruments has played a central role in defining the limits to the use of force by law enforcement officials.[31] They are of special interest for two reasons. First, they were developed through intensive dialogue between law

[28] See E/CN.4/2006/53/Add.4, paras. 18 and 43-47.

[29] General Assembly resolution 34/169 of 17 December 1979.

[30] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990.

[31] The phrase "law enforcement officials" includes all government officials exercising "police powers", sometimes including "military authorities" and "security forces" as well as police officers. (Code of Conduct, art. 1, commentary (a) and (b); Basic Principles, preamble, note).

enforcement experts and human rights experts. Second, the process of their development and adoption involved a very large number of States and provides an indication of the near universal consensus on their content.[32] Of course, neither the consensus between law enforcement and human rights experts nor the consensus among States about the desirability of compliance with the Code of Conduct and the Basic Principles is definitive in terms of their formal legal status, and some of the provisions are clearly guidelines rather than legal dictates. However, some provisions of the Code of Conduct and the Basic Principles are rigorous applications of legal rules that States have otherwise assumed under customary or conventional international law. Among these are the instruments' core provisions on the use of force. Thus, the substance of article 3 of the Code of Conduct and principle 9 of the Basic Principles reflects binding international law.

36. Human rights standards on the use of force derive from the understanding that the irreversibility of death justifies stringent safeguards for the right to life, especially in relation to due process. A judicial procedure, respectful of due process and arriving at a final judgement, is generally the sine qua non without which a decision by the State and its agents to kill someone will constitute an "arbitrary deprivation of life" and, thus, violate the right to life.[33]

37. Arbitrariness is not, however, simply the opposite of due process. The human rights obligations of States include protecting the right to life of private individuals against the actions of other private individuals.[34] That is, States must not only refrain from killing but must also exercise due diligence in preventing murder. Clearly there are instances in which the decision not to kill someone suspected of, or engaged in, the commission of a violent crime would itself result in the deaths of others. The typical situation would be one in which a suspect is threatening someone with a gun, apparently with the intention of shooting him, and in which the officer could expect to be shot if he attempted to arrest the gunman and bring him before a court. No reasonable interpretation of the State's obligation to respect the right to life would definitively rule out a police officer's decision to use lethal force in such a situation. As a result, due process remains the ideal against which "second best" safeguards for such situations must be measured. Necessity and proportionality are among the most fundamental of these second best safeguards.

38. The safeguards of necessity and proportionality are included in article 3 of the Code of Conduct and its commentary. Article 3 states: "Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty." The commentary appended to this provision explains that:

> "...
>
> "(b) ... In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.

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[32] Nigel S. Rodley, *The treatment of Prisoners Under International Law* (2nd ed.) (Oxford University Press, 1999), pp. 355-368, provides an overview of the development of the *Code of Conduct and Basic Principles*.

[33] See International Covenant on Civil and Political Rights (ICCPR), art. 6 (1).

[34] See E/CN.4/2005/7, paras. 65-76.

"(c) The use of firearms is considered an extreme measure. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. ..."

39. Similarly, the Basic Principles' most general statement on the use of lethal force, principle 9, provides that:

"Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."

40. To fully understand the legal basis for these provisions it is important to distinguish the proportionality criterion from the necessity criterion and to evaluate the contribution each safeguard makes to reconciling the obligations to respect and to ensure while adhering as closely as possible to the due process ideal.

41. While the proportionality requirement imposes an absolute ceiling on the permissible level of force based on the threat posed by the suspect to others, the necessity requirement imposes an obligation to minimize the level of force applied regardless of the level of force that would be proportionate. With respect to the use of firearms, the applicable standard of necessity is that the resort to this potentially lethal measure must be made "only when less extreme means are insufficient to achieve these objectives". The question of a measure's sufficiency can hardly be determined in advance. It is, rather, determined by the nature of the resistance put up by the suspect. In general, the way in which law enforcement officials should determine the necessary level of force is by starting at a low level and, in so far as that proves insufficient in the particular case, graduating, or escalating, the use of force.[35] Indeed, force should not normally be the first resort: so far as the circumstances permit, law enforcement officials should attempt to resolve situations through non-violent means, such as persuasion and negotiation.[36] As expressed in the Basic Principles, "They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result".[37] If it should become necessary to use force, the level of that force should be escalated as gradually as possible. While the relevant provisions of the Basic Principles are not exhaustive, they are suggestive of the course such escalation might take. As a first step, officials should attempt to "restrain or apprehend the suspected offender" without using force that carries a high risk of death — perhaps by physically seizing

[35] The issue of whether there are some situations in which an immediate recourse to lethal force may be strictly necessary in order to protect the lives of others arises in the context of so-called shoot-to-kill policies. See E/CN.4/2006/53, paras. 44-54; see also Center for Human Rights and Global Justice, *Irreversible Consequences: Racial Profiling and Lethal Force in the "War on Terror"* (New York: New York University School of Law, 2006) available at <http://www.nyuhr.org/docs/CHRGJ%20Irreversible%20Consequences.pdf>.

[36] See Basic Principles, principle 4; see also principle 20.

[37] Ibid., principle 4.

the suspect.[38] If the use of firearms does prove necessary, law enforcement officials should "give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident".[39] Like the escalation of force, one purpose of providing a warning is to avoid prejudging the level of resistance that will be shown. If the warning does not suffice, any use of firearms should be such as to "[m]inimize damage and injury".[40] The furthest extreme on this continuum of force is, of course, the intentional lethal use of force. This must be resorted to only when "strictly unavoidable".[41]

42. Proportionality deals with the question of how much force might be permissible. More precisely, the criterion of proportionality between the force used and the legitimate objective for which it is used requires that the escalation of force be broken off when the consequences for the suspect of applying a higher level of force would "outweigh" the value of the objective.[42] Proportionality could be said to set the point up to which the lives and well-being of others may justify inflicting force against the suspect — and past which force would be unjustifiable and, in so far as it should result in death, a violation of the right to life. The general standard for proportionality is that the use of force must be "in proportion to the seriousness of the offence and the legitimate objectives to be achieved".[43] From this general standard, other more precise standards may be derived for when particular levels of force may be used. The Basic Principles permit the intentional lethal use of force only "in order to protect life".

43. With respect to the proportionality of other (potentially lethal) uses of firearms, principle 9 states:

> "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape. ..."[44]

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[38] *Code of Conduct*, art. 3, commentary (c).

[39] *Basic Principles*, principle 10.

[40] Ibid., principle 5 (b); see also principle 11 (b).

[41] *Basic Principles*, principle 9; see also *Code of Conduct*, art. 31. The distinction drawn between the use of firearms and the intentionally lethal use of firearms stems from the recognition that any use of firearms is potentially lethal. Shots fired to warn rather than strike or to stop rather than kill cannot be relied upon not to cause death. Indeed, any use of force may result in death, whether by happenstance or due to the condition of the target. Principle 9 interprets the principle of proportionality as it applies to two points on a continuum, specifying the objectives that would be proportionate to that level of force.

[42] Metaphors of weighing and balancing are difficult to avoid in this context, but they risk conjuring up the idea of cost-benefit analysis. The balancing to be applied in human rights law is more in keeping with the framework used for evaluating restrictions on rights under which the reconciliation of competing values must respect "the just requirements of morality, public order and the general welfare in a democratic society" (Universal Declaration of Human Rights, art. 29 (2)).

[43] *Basic Principles*, principle 5 (a); see also *Code of Conduct*, art. 3, commentary (b) (see para. 38).

[44] See also *Code of Conduct*, art. 3, commentary (c) (see para. 38).

44. This list of objectives proportionate to the use of firearms is distinguished from the objective "to protect life" only in that it includes the disruption of some conduct that is less certain, though still likely, to cost lives. The notion of proportionality at work here is fairly simple — taking someone's life is permitted only to protect the lives of others from him or her — but gains a measure of complexity inasmuch as use of force rules must be applicable ex ante. The fundamental question is of proportionality between the objectively anticipatable likelihood that the use of force will result in death and the comparable anticipatable likelihood that failing to incapacitate the individual would result in the deaths of others. It must also be remembered that proportionality is a requirement additional to necessity. The principle of necessity will, thus, never justify the use of disproportionate force. If all proportionate measures have proved insufficient to apprehend a suspect, he or she must be permitted to escape.

45. It is tempting to focus on the ethical probity of law enforcement officials rather than the domestic rules regulating the use of lethal force. However, as I indicated in my first report to the Commission, in relation to respect for the right to life by military personnel, "Remedial proposals to inculcate higher 'ethical' standards or to develop a greater 'moral' sensibility [are] inadequate. Respect for human rights and humanitarian law are legally required and the relevant standards of conduct are spelled out in considerable detail. Remedial measures must be based squarely on those standards".[45]

C. The central concept of due diligence

1. General applicability: the case of disappearances

46. The adoption by the Human Rights Council by its resolution 2006/1 of the International Convention for the Protection of All Persons from Enforced Disappearance (hereafter Disappearance Convention) was a key accomplishment of its first session both for its potential to protect individuals and for its contribution to the development and codification of the principle of due diligence.

47. In my first report to the Commission,[46] I reviewed the antecedents of the principle in the context of the struggle against disappearances more than 25 years ago. The approach pioneered within the United Nations setting[47] was adopted and further developed by the Inter-American Court of Human Rights in particular.[48]

48. The Disappearance Convention represents the most sophisticated effort to date in articulating the due diligence standard relating to a State's affirmative obligations to ensure human rights. It exemplifies the process by which a principle that is implicit in the international human rights regime is developed by experts and refined in the jurisprudence of human rights courts before being effectively codified in treaty law. Although the offence is defined primarily in terms of acts for which the State bears some direct responsibility,[49] the Convention specifically requires States

[45] See E/CN.4/2005/7, para. 54.

[46] Ibid., paras. 73-74.

[47] See A/34/583/Add.1, para. 124.

[48] *Velásquez Rodríguez* v. *Honduras*, *Annual Report of the Inter-American Court of Human Rights*, OAS/Ser.L/V/III.19, doc. 13 (1988), in *International Legal Materials*, vol. 28 (1989), p. 291.

[49] Disappearance Convention, art. 2.

to "take appropriate measures to investigate [the relevant] acts [when they have been] committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice".[50] In addition it elaborates in some detail upon the required investigative process,[51] it makes the connection between transparency and proper record-keeping and the avoidance of disappearances,[52] and it addresses not only the necessity for, but also the content of, training for those responsible for detainees.[53] These provisions will be influential in interpreting the implications of States' due diligence obligations in other contexts.

2. Specific applicability: deaths in custody

49. The category "deaths in custody" encompasses a staggering array of abuses. With respect to this issue, my last report to the Commission on Human Rights referred to 25 communications sent to 19 countries regarding more than 185 victims.[54] (Roughly one out of four of the individual cases brought to the attention of this mandate concerns a death in custody.) These communications concerned allegations of prisoners being executed with firearms and, in one case, by immolation; torture or other ill-treatment, often for the purpose of extracting a confession, beatings, and sexual abuse resulting in death; killings by guards to break up riots or demonstrations; detainees being transported or held in containers that were so overcrowded or lacking in ventilation as to lead to the deaths of large numbers of detainees; and guards standing by while persons in custody were killed by private citizens. This catalogue of abuses indicates that the specificity of custodial death as a category of violation is not due to the cause of death. Executions, the use of excessive force, and other abuses resulting in death occur against persons outside of custody as well as in custody.

50. What makes "custodial death" a useful legal category is not the character of the abuse inflicted on the victim but the implications of the custodial context for the State's human rights obligations. These implications concern the State obligations to both prevent deaths and respond to those deaths that occur. When the State detains an individual, it is held to a heightened level of diligence in protecting that individual's rights. When an individual dies in State custody, there is a presumption of State responsibility. These interlocking implications produce the legal specificity of custodial death as a human rights violation.

51. With respect to the prevention of deaths in custody, States have heightened responsibilities for persons within their custody. In all circumstances, States are obligated both to refrain from committing acts that violate individual rights and to take appropriate measures to prevent human rights abuses by private persons. The general obligation assumed by each State party to the International Covenant on Civil and Political Rights (ICCPR) is, thus, "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in

[50] Ibid., art. 3.

[51] Ibid., art. 10.

[52] Ibid., arts. 17, 18.

[53] Ibid., art. 23.

[54] E/CN.4/2006/53/Add.1. The communications concerned 185 identified individual cases of death in custody; however, some communications also dealt with larger groups of unidentified persons.

the present Covenant. ..."[55] This obligation has notably far-reaching implications in the custodial context. With respect to the obligation to respect rights, the controlled character of the custodial environment permits States to exercise unusually comprehensive control over the conduct of government officials — police officers, prison guards, soldiers, etc. — in order to prevent them from committing violations. With respect to the obligation to ensure rights, the controlled character of the custodial environment also permits States to take unusually effective and comprehensive measures to prevent abuses by private persons. Moreover, by severely limiting inmates' freedom of movement and capacity for self-defence, the State assumes a heightened duty of protection. While the same basic standard applies in custodial and non-custodial settings — the State must exercise "due diligence" in preventing abuse[56] — the level of diligence that is due is considerably higher in the custodial context.

52. States are obligated to take measures to provide mechanisms of strict legal control and full accountability and to take measures to provide safe and humane conditions of detention. Some concrete measures are required by treaty or customary international law. Of particular note are ICCPR, the Convention on the Rights of the Child, and the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) and to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). In addition, a number of instruments adopted by United Nations organs have formulated broadly applicable measures conducive to fulfilling general legal obligations to respect and ensure the right to life.[57] In addition there are various other instruments more specifically concerned with the problem of torture, a form of abuse that leads to death in some cases. While many of the provisions contained in these instruments would be best conceptualized as guidelines, they were generally developed with the extensive involvement of both human rights and correctional experts, suggesting that many of the measures they contain will typically be necessary in practice to effectively prevent human rights violations.

53. Another legal consequence of the fact of detention is that, in cases of custodial death, there is a presumption of State responsibility. The rationale for this presumption was illustrated in the case of *Dermit Barbato* v. *Uruguay*.[58] In that case, the Human Rights Committee found that Uruguay had violated the right to life of Hugo Dermit while he was detained at a military barracks. The cause of death found by the autopsy conducted by the State and recorded on his death certificate was not contested: he died of "acute haemorrhage resulting from a cut of the carotid artery".[59] However, while the State claimed that "he had committed suicide with a razor blade", the author of the communication claimed that he had been killed by

[55] ICCPR, art. 2 (1).

[56] See E/CN.4/2005/7, paras. 71-75.

[57] See, e.g., Basic Principles for the Treatment of Prisoners; Basic Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Basic Principles on the Use of Force and Firearms; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; United Nations Standard Minimum Rules for the Administration of Juvenile Justice; Standard Minimum Rules for the Treatment of Prisoners; and United Nations Rules for the Protection of Juveniles Deprived of their Liberty. For a detailed study of these instruments, see Rodley, op. cit. at note 32.

[58] Communication No. 84/1981, *Dermit Barbato* v. *Uruguay*, *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 40* (A/38/40), annex IX.

[59] Ibid., paras. 1.4 and 6.1.

the military through mistreatment and torture.[60] The State offered no evidence in support of its explanation, and the author of the communication was unable to adduce more than circumstantial evidence — mainly, that Dermit had been in good spirits inasmuch as he expected to be released shortly. The Human Rights Committee concluded that:

> "While the Committee cannot arrive at a definite conclusion as to whether Hugo Dermit committed suicide, was driven to suicide or was killed by others while in custody; yet, the inescapable conclusion is that in all the circumstances the Uruguayan authorities either by act or by omission were responsible for not taking adequate measures to protect his life, as required by article 6 (1) of the Covenant."[61]

54. In other words, the State's two-fold obligation to ensure and respect the right to life, together with its heightened duty and capacity to fulfil this obligation in the custodial environment, justifies a rebuttable presumption of State responsibility in cases of custodial death.[62] One consequence of this presumption is that the State must affirmatively provide evidence that it lacks responsibility to avoid that inference.[63] Another important consequence of this presumption is that, absent proof that the State is *not* responsible, the State has an obligation to make reparations to the victim's family. This is the case even if the precise cause of death and the persons responsible cannot be identified.

D. Balancing State responsibilities against legal doctrines seeking to empower victims

55. An important number of recent communications I have received have called into question the compatibility of some tenets of Islamic criminal law, as practised in some jurisdictions, with the applicable requirements of international law. Such questions are inevitably sensitive but, like all other laws and practices relevant to the extrajudicial executions mandate, must be examined objectively in accordance with the relevant standards.

56. To varying degrees different schools of Islamic law determine punishment on the basis of a theory of equivalent retaliation in the case of intentional crimes committed against the bodily integrity of a human being (*qisas* crimes). This calls for the infliction on the guilty party of the same treatment suffered by the victim.[64] Similarly, Islamic law gives victims and their families the ability to pardon the offender and accept financial compensation (*diyah*) for the crime.[65] Finally, in some

[60] Ibid., para. 1.4.

[61] Ibid., para. 9.2.

[62] This conclusion was also reached by the first person to hold this mandate: "A death in any type of custody should be regarded as prima facie a summary or arbitrary execution and appropriate investigations should immediately be made to confirm or rebut the presumption" (E/CN.4/1986/21, para. 209).

[63] The problem of States advancing implausible and unsubstantiated accounts that could not readily be disproved has confronted this mandate since the beginning. See E/CN.4/1983/16, para. 201. Such allegations cannot be resolved without evidence from the State.

[64] This may also apply to involuntary killings, although Islamic schools of jurisprudence differ on the scope of intentional murder and on whether quasi-intentional murder should also receive the same punishment.

[65] See e.g. E/CN.4/2006/53/Add.1, pp. 108 and 219.

jurisdictions the law has been interpreted to authorize the victim's family to carry out the death sentence.

57. Each of these practices can give rise to serious concern in human rights terms. Where the principle in relation *to qisas* is applied without the possibility of appeal to a court in relation to both the verdict and the sentence, the resulting principle of absolute, equivalent retaliation amounts to a mandatory death penalty and is thus incompatible with customary international law and with article 6 of ICCPR.

58. The practice of *diyah* could perhaps be seen as a form of empowerment of the victims of violations of the right to life (or rather of their families) and thus as a measure consistent with the obligation under article 2 (3) (a) of ICCPR to "ensure that any person whose rights ... are violated shall have an effective remedy". It is true that the payment of *diyah* saves lives to the extent that it avoids executions, and it is thus appropriate for Governments to engage in proactive mediation with a view to encouraging victims' families to accept *diyah* rather than the death penalty.

59. However, there are circumstances in which the choice of accepting *diyah* can operate inconsistently with international human rights law, and in particular with the guarantees of non-discrimination and procedural objectivity (due process) in the imposition of the death penalty.

60. First, non-discrimination concerns arise in relation to the implementation of *diyah*. Discrimination on the basis of wealth, social origin or property is a problem in the sense that a wealthy offender can effectively buy freedom in a way which is not open to poor offenders. *Diyah* is also potentially discriminatory based on the status of the victim. Thus it has been shown that the amount of *diyah* can be less for female victims than for male victims, and less for non-Muslim victims than for Muslim victims, with further discrimination between recognized religious minorities (*dhimmah*) and non-recognized minorities.[66]

61. Second, where the private *diyah* pardon stands alone and when it relates to the death penalty, it is almost certain to lead to significant violations of the right to due process in situations where a pardon is not granted. To the extent that the procedure does not provide for a final judgement by a court of law, or for the right to seek pardon or commutation of the sentence from the State authorities, the requirements of international law will be violated. Where the *diyah* pardon is available it must be supplemented by a separate, public system for seeking an official pardon or commutation.

62. Finally, contexts in which the victim's relatives are entrusted with the responsibility of carrying out the death sentence are incompatible with international law. The criminal law functions of imposing and carrying out the death penalty are quintessentially public functions and cannot be "outsourced" to private individuals, any more than the process of trial and sentencing can be privatized. In addition, entrusting the conduct of an execution to inexperienced hands and, even more problematically, to those who have reason to bear a grudge against the convicted person, greatly enhances the likelihood of torture or cruel, inhuman or degrading treatment being applied to the convict.

[66] See the progress report on discrimination in the criminal justice system by Leïla Zerrougui, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/Sub.2/2005/7), para. 45.

63. These observations are made in the knowledge that the legal systems in very few countries are based exclusively on Islamic law. Rather, in the vast majority of countries with significant Islamic populations, the legal systems are based on a mixture of Islamic law and other law, such as a civil code. In such countries, the criminal justice system may have modified the equivalent retaliation principle of *qisas* or provided for means of commutation additional to or in lieu of *diyah*. In this regard, the Special Rapporteur notes the case of Tunisia, where "[e]ven after the death sentence has been passed, the President of the Republic ... [has] not in practice authorize[d] execution of the death penalty".[67] This example helps to illustrate that a system of commutation by a public official may not in practice be incompatible with Islamic law, and may exist alongside or in place of the private *diyah* pardon.

64. I would also note that difficulties balancing State responsibilities with practices seeking to empower victims are not unique to Islamic law. Thus it could be argued that the victim's rights movements in some Western countries, involving increased victim impact evidence in capital trials, might also raise concerns in relation to ensuring due process and the functioning of an independent and impartial justice system in capital cases.

IV. Recommendations

65. **The General Assembly should appeal to all States that have so far failed to respond meaningfully to the requests for visits made by the Special Rapporteur to take appropriate action. In particular, the eight members of the Human Rights Council that have not responded should be called upon to honour their undertakings to cooperate fully with the Council and its procedures.**

66. **A thorough and systematic investigation of all killings that occurred in Gaza, Lebanon and northern Israel since the beginning of June 2006 is indispensable.**

67. **The General Assembly should call upon the United Nations Secretariat to establish a full-fledged international human rights monitoring mission in Sri Lanka.**

[67] Roger Hood, *The Death Penalty: A Worldwide Perspective* (3rd ed.) (Clarendon Press, 2002), p. 35 (citing Tunisia's response to a request for information related to the preparation of the report of the Secretary-General on capital punishment and implementation of the safeguards guaranteeing the protection of the rights of those facing the death penalty (E/1995/78 and Add.1 and Add.1/Corr.1).

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Item 66 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Human rights defenders

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report submitted by the Special Representative of the Secretary-General on Human Rights Defenders, Hina Jilani, in accordance with General Assembly resolution 60/161.

Summary

In this her sixth annual report to the General Assembly, the Special Representative of the Secretary-General on the situation of human rights defenders gives a brief analysis of the methodology of work used during the six years of the mandate, before focusing on the right to freedom of assembly in relation to the activities of human rights defenders.

In the first section of the report, the Special Representative looks at how the methodology of the mandate has contributed to fulfilling the aims of Commission on Human Rights resolution 2000/61 and subsequent resolutions, and the implementation of the Declaration.

The main part of the report looks at different types of violations of human rights defenders' right to freedom of assembly, before looking at the provisions of the Declaration and other international human rights instruments that protect this right, including sections on the powers and responsibilities of States and of the police, and on reasonable restrictions on the right to freedom of assembly.

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The report concludes with recommendations to States on how to further enhance and ensure full implementation of the right to freedom of assembly as provided for in the Declaration as well as in other international instruments.

The right to freedom of assembly is one of the principal rights that need to be guaranteed in order to enable human rights defenders to carry out their important work. Without a guarantee of this right and protection against its violation by State officials or non-State entities, human rights defenders will be restricted in their ability to fulfil their fundamental role of protecting and promoting human rights. With this perspective in mind, the Special Representative expresses serious concern at the findings presented in this report and hopes that States will take stronger action in implementing the Declaration.

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I. Introduction

1. The present report is the sixth annual report submitted to the General Assembly by the Special Representative of the Secretary-General on the situation of human rights defenders. It is submitted pursuant to Commission on Human Rights resolution 2005/67 and General Assembly resolution 60/161.

2. In his report "In larger freedom: towards development, security and human rights for all", the Secretary-General pointed out that "[t]he notion of larger freedoms also encapsulates the idea that development, security and human rights go hand in hand" (A/59/2005, para. 14). The work of human rights defenders makes critical contributions to achieving the core objectives of the United Nations and its Member States. Their efforts to promote and protect human rights are fundamental in establishing and sustaining democracy, maintaining international peace and security and advancing the agenda for development.

3. By resolution 53/144 of 9 December 1998, the General Assembly adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, known as the Declaration on Human Rights Defenders ("the Declaration"). The provisions of the Declaration provide a firm basis in international human rights law for the support and protection of human rights defenders and their activities to promote and protect human rights. Subsequent resolutions (see in particular resolution 58/178 of 22 December 2003) call for action by States and United Nations bodies to support the implementation of the Declaration.

4. The first part of this report gives an overview and a brief analysis of the methodology of work used during the six years of the mandate of the Special Representative of the Secretary-General on the situation for human rights defenders. The main part of the report focuses on the right to freedom of assembly in relation to the activities of human rights defenders. The report concludes with recommendations on how to further enhance and ensure full implementation of the right to freedom of assembly as provided for in the Declaration as well as in other international instruments.

II. Methodology of work used on the mandate

5. Commission on Human Rights resolution 2000/61 stipulates in paragraph 3 that the Special Representative on Human Rights Defenders "shall report on the situation of human rights defenders in all parts of the world and on possible means to enhance their protection in full compliance with the Declaration". "Protection" in this context should be understood to include both the protection of defenders themselves and the protection of their right to defend human rights.

6. The main activities of the Special Representative shall be "to seek, receive, examine and respond to information on the situation and the rights of anyone, acting individually or in association with others, to promote and protect human rights and fundamental freedoms"; "to establish cooperation and conduct dialogue with Governments and other interested actors on the promotion and effective implementation of the Declaration"; and "to recommend effective strategies better to protect human rights defenders and follow up on these recommendations".

7. The first section of this report will give an overview of how the methodology of the mandate has contributed to fulfilling the above-mentioned aims of the resolution and the implementation of the Declaration. The Special Representative will look at the complaints procedure, at official country visits, and at participation in international and regional events.

8. The Special Representative would like to point out that this is only meant to be a preparatory overview of this very important topic, which that can be the basis for a more thorough study aimed at improving working methods and methodology in the future.

A. The complaints procedure

9. Through the complaints procedure, the Special Representative addresses individual cases of human rights violations committed against human rights defenders with the State(s) concerned. Information on such cases is received from a variety of sources, and after thorough research in order to make sure to the extent possible that the information is accurate, the Special Representative identifies concerns to be raised with States and recommends to States how to ensure compliance with the Declaration.

10. Contact with States is usually conducted through either an urgent appeal or a letter of allegation addressed, respectively, to the State's Minister for Foreign Affairs (with a copy to its permanent mission to the United Nations Office at Geneva), or its Permanent Representative.

11. The communications provide details of the victim, a description of the alleged events and the human rights concerns raised by the information received; the primary objective is to ensure that State authorities are informed of the allegation as soon as possible and that they have an opportunity to investigate the case and to end or prevent any human rights violation. The communications remain confidential until the end of the reporting year when, in accordance with resolution 2000/61, an annual report is submitted to the Commission on Human Rights (now the Human Rights Council) containing a summary of the communications sent and the replies received, together with recommendations. Often, communications are sent jointly with other mandate holders. The Special Representative's recommendations concern how to implement the Declaration and ensure the protection of defenders, and always indicate her willingness and availability to provide further advice on effective strategies for protection.

12. From the beginning of the mandate until 1 December 2005, the Special Representative sent 1,194 communications to Governments and received responses to 720 of them. Taking into account that some of these communications were sent in the last four months of 2005 and that States might have replied after the reporting deadline of 1 December 2005, this means that more than 400 communications have gone unanswered (i.e. less than two thirds of the cases).

13. States have made efforts to provide the Special Representative with responses, some of them elaborate and detailed, and in some cases the Government recognizes the wrongdoing of officials, or promises to investigate an alleged violation or ensure the protection of defenders. The Special Representative nevertheless regrets that Governments have often failed to respond in a manner that is conducive to

cooperation and dialogue. Among the responses received, the Special Representative has found the following trends: denial of the human rights defender status of the victim or of his/her link to human rights work; the invocation of national law to justify acts; denial of facts presented; contending that national remedies had not been sought; alleging that the victims' acts constituted a disturbance of public order; and questioning the legitimacy of the mandate.

14. The number of communications transmitted by the Special Representative to the Government of a particular country cannot necessarily be taken as a comprehensive reflection of the situation of defenders in that country. The fact that no communications have been sent to a Government might indicate that there are few gaps in the implementation of the Declaration in that country, but it could also be indicative of factors such as lack of awareness about the mandate, difficulties for or a deficiency in the capacity of civil society, or strong State repression of civil society preventing information about violations from reaching the Special Representative.

15. Despite these constraints on her ability to make an accurate assessment of the severity or frequency of violations against defenders in a country or region based on communications received by her, the Special Representative through this procedure can often detect trends in both the kinds of violations committed and whether there has been an increase. While the Special Representative can use the information she gathers through the complaints procedure to alert the Human Rights Council or other United Nations bodies to a pattern of increased violations, the absence of complaints does not allow her to state, with any degree of accuracy, that the environment in a country or region is conducive to the work of defenders.

16. The most prevalent challenge in relation to the complaints procedure is the limited possibility for follow-up on the developments in each case where defenders' rights have been or are in danger of being violated. The efficacy of the complaints procedure very much relies on the willingness of States to cooperate. At present, the Special Representative does not have the capacity, i.e. the human resources, that would be needed to ensure proper follow-up in each case.

17. The Special Representative also issues press releases in relation to allegations of violations of the rights of human rights defenders. Since the beginning of the mandate, the Special Representative has issued 21 press releases. Nine of them were in connection with official visits to countries, or activities carried out by the Special Representative. The remaining 12 were issued in relation to immediate and grave concerns about the situation of a group or groups of defenders in a particular country. Of these 12 press releases, 9 were sent jointly with other mandate holders.

B. Official country visits

18. The Special Representative is mandated to conduct official visits to States. In those cases where the Special Representative would like to make an official visit to a country that has not extended a standing invitation to the special procedures mandate holders, she writes to the Government asking for an invitation. As of July 2006, 55 countries had issued a standing invitation to the special procedures. As of August 2006, 20 countries had not responded to repeated requests for an invitation from the Special Representative.

19. Prior to and during her official missions, the Special Representative relies on the assistance of the authorities, United Nations offices/country teams, national human rights institutions and defenders' organizations in the planning and coordination of the visit. In accordance with the activities prescribed in resolution 2000/61, following each visit, the Special Representative submits a report on the mission indicating her main concerns and recommendations for action. These mission reports have presented a comprehensive overview of the situation of human rights defenders in the countries concerned. As is the case with the complaints procedure, the effectiveness of the recommendations presented is dependent on the willingness of the Government to comply with them.

20. These visits provide an opportunity to seek, receive and examine in detail the role and situation of human rights defenders in the country, through meeting with defenders and their organizations and receiving information from them; they also provide a unique opportunity to gather first-hand information about the situation of defenders by observing demonstrations, trials, and the work of defenders' organizations.

21. In most cases, the Special Representative has had the full cooperation of the Government in the planning of her visit and has been able to meet extensively both with representatives of the authorities and defenders themselves. There have, however, been instances where restrictions on their freedom of movement have prevented defenders from meeting the Special Representative, and instances where Governments have not cooperated sufficiently to make timely arrangements or allow meetings at the appropriate level, with the authorities competent to make or influence State policy. The Special Representative regrets that in such situations her dialogue with authorities has been of much less benefit than in countries where she was able to address her concerns and recommendations at the highest level.

22. As regards establishing cooperation and conducting dialogue with defenders and the authorities, the increased information received from defenders in the country after an official mission testifies to the significance of these visits in establishing contact with the defenders themselves.

23. The Special Representative has some concerns regarding her ability to prepare mission reports within the shortest possible time and acknowledges that, at least in the case of the more recent visits, there has been a delay in the compilation of the report that could have affected the effectiveness of her recommendations. The interest of a Government in issues relevant to her mandate is keenest during and immediately following the mission. Delay in communicating the substance and details of the issues can result in losing valuable opportunities for immediate and effective implementation of her recommendations. This is a shortcoming that she is committed to rectifying for any future missions, in consultation with the Special Procedures Branch of the Office of the High Commissioner for Human Rights.

C. Participation in international and regional conferences and events

24. The Special Representative regularly attends regional and international human rights events. The Special Representative would like to reiterate that non-governmental organizations (NGOs) and the defenders working with them in her view constitute the raison d'être of the mandate. Consequently, she has made every effort to be accessible to them.

25. Among the events organized by civil society or regional or intergovernmental organizations in which the Special Representative has participated recently were the Dublin Platform for Human Rights Defenders in Ireland, the International Consultation on Women Human Rights Defenders in Sri Lanka, the World Social Forum in Pakistan, the Carter Conference in the United States of America, the International Conference on Lesbian, Gay, Bisexual and Transgender (LGBT) Human Rights in Canada, and conferences and round tables hosted by the Organization for Security and Cooperation in Europe, the European Union (EU), the African Union and the Inter-American Commission on Human Rights.

26. Through participating in international and regional human rights events, the Special Representative is able to learn about and report on global and regional initiatives aiming to promote the implementation of the Declaration, such as the adoption of the EU Guidelines on Human Rights Defenders and the creation of the mandate for a Special Rapporteur on human rights defenders in Africa of the African Commission on Human and Peoples' Rights.

27. Through participation in these events, the Special Representative is able to meet directly with defenders in order to receive information and hear personal testimonies of violations of their rights and fulfil her mandate.

28. Through her participation in these events the Special Representative is also able to encourage and help build networks and alliances between human rights defenders across national borders and regional boundaries and to observe and report on initiatives that have strengthened cooperation, coordination and solidarity among defenders at national, regional and international levels.

III. Meeting the standards of the right to freedom of assembly as contained in the Declaration on Human Rights Defenders and other international and regional instruments

A. Violations of the right to freedom of assembly of defenders

29. In her initial report to the Commission on Human Rights (E/CN.4/2001/94), the Special Representative identified a series of issues requiring her special consideration, including the right to freedom of assembly, and in all her successive reports to the Commission she has reported on cases of violations of the right to peaceful assembly. The following is a summary and an analysis of the trends in relation to violations of this right, and it concludes with recommendations addressed to States, individually and as Members of the United Nations, on conformity with international standards in this field.

30. At least 253 of the 1,194 communications to Governments concerning alleged violations of the Declaration dealt directly with violations of the right to freedom of assembly. The Special Representative has received responses to less than half of these communications from the Governments concerned. Although some Governments have replied to all her communications in detail, the lack of responses or non-substantive responses from many Governments is a concern for the Special Representative.

31. In terms of defenders' activities, the right to freedom of assembly relates to numerous forms of assembly ranging from a meeting inside a private residence to meetings and conferences in public places, demonstrations, vigils, marches, picket lines and other kinds of assemblies, indoors or outdoors, with the aim of promoting and protecting human rights. The assemblies can be organized by an NGO, a trade union, an ad hoc group, a social movement, or by individual defenders seeking to raise an issue for debate or protesting against human rights violations of different kinds.

32. Restrictions imposed on freedom of assembly have been broadly applied to prohibit or disrupt peaceful human rights assemblies, frequently on the pretext of the need to maintain public order, and increasingly relying on counter-terrorism legislation, arguments and mechanisms. The Special Representative has no reason to believe that the restrictions on, or violations of, the right to freedom of assembly have decreased. Rather, there has been a continuous increase, apart from a minor decrease in 2004, in the number of cases raised with Governments concerning freedom of assembly.

33. In addition to the communications sent directly to Governments, the Special Representative has issued six press releases where violations of the right to freedom of assembly have been among the issues raised. Three of them were issued in connection with official country missions undertaken by the Special Representative during which she witnessed violations of the right to freedom of assembly or heard reports from defenders or NGOs of such violations. These were her missions to Nigeria (May 2005), Israel and the Occupied Palestinian Territory (11 October 2005) and Brazil (20 December 2005). The three other press releases were issued to express serious concern over situations of violations of the right to freedom of assembly in Bolivia (16 October 2003), India (13 April 2006) and Nepal (20 April 2006). These three press releases were issued jointly with other mandate holders.

34. Communications concerning alleged violations of the right to freedom of assembly of defenders have been sent to 62 countries. The Special Representative has sent more than 10 communications to the following countries: Israel (11), Nepal (11), Tunisia (22), Uzbekistan (11) and Zimbabwe (14).

35. From an analysis of the communications that the Special Representative has sent to Governments on this issue as of the end of 2005, she is able to detect certain trends regarding both the types of violations and the identity of the alleged perpetrators. Broadly, the violations can be divided into six groups: arrests, violence against defenders during assemblies including defenders who have been killed, threats against defenders, travel restrictions for defenders wishing to participate in assemblies to promote and protect human rights, assemblies that are interrupted or that are not allowed to be held, and restrictions imposed on this right through legislation.

36. The Special Representative is aware that there are several factors that determine the flow of information leading to the communication of concern by her to any country regarding a situation. The number of cases brought to her attention from a country may not always mirror the frequency of violations and the comparative degree to which the freedom of assembly is violated. While a small number of cases may suggest that the situation is satisfactory in terms of the right to freedom of assembly, it can also be a sign that repression of human rights activities is so prevalent that defenders do not take the risk of assembling. Nevertheless, from

material gathered through official missions, participation in conferences, meetings and consultations with defenders, and information relayed to her by Governments and civil society, the Special Representative is able to deduce some main areas of concern.

37. A reading of the cases where communications have been sent suggests that violations take place before, during and after assemblies. The numbers presented in the present report are based on those cases where it is clear to the Special Representative and the defenders in question that the violation is related to the defenders' participation in, or planned participation in, an assembly with the purpose of promoting and protecting human rights. Additionally, there are numerous cases where the defenders in question and the Special Representative have good reason to believe that the violations are linked partly to the defenders exercising their right to freedom of assembly, but where the violations are more directly linked to violations of other articles of the Declaration and where the violations have not taken place during an assembly, or directly before or after.

1. Arrests

38. The Special Representative has sent 139 communications to Governments dealing with defenders who have allegedly been detained or arrested while exercising their right to freedom of assembly. Arrests and detentions are often arbitrary. In most of the cases, the defenders have been arrested during demonstrations that have been broken up by the police, or during meetings or conferences. The majority of cases concerning arrests of defenders have been sent to Governments in Africa, the Middle East and North Africa, and Asia.

39. Arrests of defenders are in most cases accompanied by violence against defenders, and a large number of those arrested report having been ill-treated and even tortured or raped in connection with their arrest and detention. In many of the cases, defenders are never brought to trial, but merely released on bail after a certain amount of time, or detained without having their case brought before a judge. In some countries the Special Representative has received reports of arrested defenders being released on the condition that they do not return to the area where they were participating in peaceful assembly.

40. Several cases have been reported to the Special Representative where defenders allegedly have been arrested "preventively", i.e. to hinder them from participating in planned demonstrations, meetings or conferences, both in the country and abroad. In September 2001, the Special Representative sent a communication to Cuba regarding a defender who was reportedly detained to prevent him from taking part in a demonstration to celebrate Human Rights Day. Communications have also been sent regarding defenders who have been arrested on their way to assemblies, in particular international conferences, seemingly in order to prevent them from participating in the event.

2. Violence against defenders and defenders killed during assemblies

41. The Special Representative has sent 74 communications to Governments concerning violence against defenders exercising their right to peaceful assembly. The Special Representative is gravely concerned about the rising number of incidents reported to her concerning an excessive and often indiscriminate use of force against those exercising their right to peaceful assembly. Reports have been

received of tear gas, rubber-coated metal bullets, rubber bullets, stun grenades and other violent means being used in order to disperse peaceful gatherings.

42. In eight of these cases, from Argentina, Bolivia, the Dominican Republic, India, Israel, the Gambia and Turkey, defenders were killed. Altogether, the Special Representative has had reports of more than 85 defenders having been killed during demonstrations, picketing, meetings or conferences. In one case in Bolivia in 2003, when demonstrators urged the Government to abandon a project to sell gas and to approve a programme that would benefit the local inhabitants, the Special Representative and other United Nations experts issued a press release citing allegations of excessive use of force by the army and the police in the course of their ongoing law enforcement operations, as a result of which at least 50 persons, many of them belonging to indigenous communities, had died and more than 100 had been injured.

43. In a majority of cases, the alleged perpetrators of violence against defenders are State officials, mainly the police or military personnel. Nevertheless, non-State actors are also, on occasion, reported to be the perpetrators of violence against defenders. Violations of the rights of human rights defenders by non-State actors are seldom adequately or effectively addressed by the authorities.

44. It is true that at times peaceful assemblies have turned violent and that on some occasions there are elements within these assemblies who resort to unprovoked violence. The Special Representative has, nevertheless, observed that it is frequently the excessive and disproportionate use of force by the police or army during peaceful demonstrations that has provoked violent reactions from an otherwise peaceful assembly, in turn answered by more violence from the police or army and again leading to deaths and severe injuries. The Special Representative is also gravely concerned at allegations that the authorities in some countries and settings have used undercover personnel to instigate violence in peaceful assemblies in order to justify using violent means to disperse the assembly or arrest people. Such conduct by State authorities clearly contradicts the principle of State responsibility enshrined in articles 2 and 12 of the Declaration and renders the State accountable for provocations that result in violence.

45. In a press release issued after her visit to Nigeria, the Special Representative raised serious concerns regarding the practices of the police, as she had heard accounts while in Nigeria of excesses committed during demonstrations and law enforcement operations, torture and unlawful confinement. The Special Representative noted that while the Government had informed her of various initiatives to train the police, she nevertheless had grave reservations regarding the seriousness of the commitment to reorient the police, and that so far such training appeared to have had only a marginal impact, in particular at the local level (see E/CN.4/2006/95/Add.2).

46. The press release issued at the end of the mission to Israel and the Occupied Palestinian Territory noted the total lack of respect for the freedom of assembly apparent in repressions of the right to peaceful protest in the Occupied Palestinian Territories (see E/CN.4/2006/95/Add.3). In a press release issued following the official mission to Brazil in December 2005, the Special Representative stated that she was greatly disturbed by reports indicating that when human rights activists organize they are accused of forming criminal gangs and when they mobilize for

collective action to protest violation of rights they are accused of creating public disorder (see E/CN.4/2006/95/Add.4).

47. In a press release issued on 13 April 2006, the Special Representative expressed concern about the impact of the raising of the height of a dam on the Narmada River in India, and expressed serious concern about information that the police had used indiscriminate, excessive and disproportionate force against protestors.

48. The Special Representative is particularly concerned at reports she has frequently received from several countries about the use of so-called non-lethal weapons like rubber bullets by security forces in their operations during public gatherings. In response to her questions, authorities in certain States could not satisfy her about the procedures that allegedly streamline procedures for the authorization and monitoring of such use.

3. Threats and accusations against defenders

49. The Special Representative has transmitted 32 communications to Governments concerning threats against defenders or members of their families either prior to, during or after their participation in a peaceful assembly. More than half of the communications sent concerning such threats have been sent to States in Central and South America.

50. Defenders are targeted for participating or organizing public gatherings. Information received by the Special Representative indicates that defenders in some cases have lost their jobs or have been suspended from university, allegedly for having participated in a demonstration or meeting.

51. Defenders and their families have received telephone calls threatening death or injury. In addition to verbal threats, there have been cases where defenders and their families and/or colleagues have received funeral wreaths or condolence cards, clearly indicating that the defender in question could be killed if he or she continues his or her human rights work. Defenders have also been accused of "inciting violence", "forming criminal gangs", "creating public disorder", or "conducting anti-State activities".

52. In most cases it is difficult to pinpoint the source of such threats. Often the threats are transmitted to defenders on the telephone, or in the form of anonymous letters and cards, and sometimes the threats are even given via family members, friends or colleagues. In some cases the defenders themselves have indicated that they have reason to believe that the authorities are behind the threats, whereas in other cases they have reason to believe that the persons threatening them are non-State actors. In some instances it has also been alleged that the authorities and non-State actors have colluded in issuing these threats.

4. Demonstrations and meetings interrupted/prohibited

53. The Special Representative has transmitted 16 communications concerning demonstrations, meetings, conferences and other assemblies that have not received authorization from the authorities, or that have otherwise been prevented from being held. These cases do not include those where a demonstration was violently dispersed or where travel restrictions were imposed on defenders. Communications dealing with assemblies that have been interrupted or otherwise prevented from

being held have been sent to all regions apart from Central and South America. The majority of the cases have been reported from the Middle East and North Africa and from Asia.

54. Where authorization was withheld, some of the reasons given were that the events or their organizers would "agitate the population", that the organization responsible for the event was not registered, that the organizers had not sought permission for the event to be held, that there was a danger of violent counter-demonstrations, and that the demonstration would interrupt traffic. In some cases, the authorities closed certain areas to demonstrations by defenders on the ground that they were "closed military areas", although there were allegedly no military installations situated in the areas concerned. In most of the cases, however, no reason was given at the time and the Special Representative has not received a response from the Government indicating the reason for not allowing the assemblies to be held.

55. In the remaining cases, authorization was initially given, or no authorization was needed according to the law, but participants were prevented from entering the conference, the meeting or the place of the demonstration, often without explanation. Defenders have reported to the Special Representative that the granting of authorization often seems to be arbitrary rather than based on laws and regulations. Reports also indicate that decisions are often politically motivated, depending on a Government's views on the issue and its relationship with the organization that has led the initiative.

56. With respect to the reasons for restricting or denying the freedom of assembly, the Special Representative draws attention to article 2 of the Declaration, which places the responsibility on the State to adopt such steps as may be necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that persons are able to enjoy human rights and fundamental freedoms. The right to protest is an essential element of the right to participation in any democratic dispensation and restrictions imposed on this right must be closely scrutinized with respect to their necessity and reasonableness. The Special Representative has noticed that administrative measures to restrict or prohibit the freedom of assembly are in many instances imposed without serious consideration or relevance to genuine concerns relating to security, public safety or order, etc. She is also unable to accept that a peaceful assembly that is threatened with violence should itself be prohibited rather than be assured of protection in accordance with State responsibility.

5. Travel restrictions for defenders

57. Twenty-eight communications have been sent by the Special Representative regarding cases where the Authorities have imposed travel restrictions on defenders who were travelling to international events. In most of these cases, defenders have been prevented from leaving the country by representatives of the authorities at airports or border-crossings. In some of the cases, defenders have not been issued with the documents needed in order to travel. Communications relating to travel restrictions for defenders have been sent to countries in all regions, but nearly half of the communications have been sent to States in the Middle East and North Africa. A large number of communications on this question have also been sent to Eastern European and Central Asian States.

58. In those cases where the authorities have given a reason for the restrictions on travel, defenders have been deemed "security threats" or "spies" and have been accused of being involved in "terrorist activities" or of trying to "tarnish the image of the country abroad". In June 2005, a communication was sent to Pakistan concerning a woman defender who was supposed to travel to the United States where she was due to participate in a conference organized by a human rights group. The defender had allegedly been placed on the so-called exit-control list, and had had her passport taken away, and it was reported that the President of Pakistan had stated that he imposed a travel ban on the defender in order to protect the image of Pakistan abroad.

59. The Special Representative is particularly concerned at reports of defenders who have been prevented from attending United Nations conferences, events at the European Parliament, conferences organized by OSCE and large regional and international conferences such as the African Peace Forum and the World Social Forum. In November 2005, the Special Representative sent a communication to Belarus concerning a lawyer and human rights defender who had had her application to leave the country to participate in a conference organized by OSCE, rejected.

60. The Special Representative notes that travel restrictions imposed on defenders in order to prevent them from participating in assemblies of different kinds outside their country of residence is contrary to the spirit of the Declaration and the recognition in its preamble that individuals, groups and associations have the right to "promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels".

6. Legislation restricting the right to freedom of assembly

61. The Special Representative has sent five communications concerning legislation restricting the right to freedom of assembly, to Belarus (3), Egypt and Zimbabwe. These communications concern the amendment of national laws or the introduction of new laws, regulations or decrees that limit the right to freedom of assembly.

62. While most national constitutions formally guarantee the right to freedom of assembly, in many cases this right has subsequently been restricted through secondary legislation. The Special Representative is encouraged by information that some States have amended national laws to remove or reduce limitations on the freedom of assembly, as well as on the freedom of expression and association. Regrettably, however, there have been more cases reported of restrictive laws being introduced or reintroduced in this field than there have been reports of legislation being changed in order to conform to international standards. Most national laws require official written permission for holding assemblies, rallies and demonstrations. National laws in some States, such as Bahrain and Myanmar, can be invoked to prohibit any gathering of five or more persons without official authorization.

63. In certain States the law requires notification of the intent to hold public gatherings, and there are satisfactory appeal procedures should authorization be denied. On the other hand, in numerous States permission often is not given, and administrative resolutions and decrees have allegedly been used to declare even peaceful assemblies unlawful and thereby punishable under the Criminal Code. In

several cases it has also been reported to the Special Representative that no appeal procedures exist when permission to hold peaceful assemblies has been denied.

64. The Special Representative has received information from defenders indicating that the authorities often prevent them from holding rallies, demonstrations or other assemblies in central areas of cities and towns, but that the assembly has been given permission to convene in "pre-authorized" locations, or in locations on the outskirts of the city. Some States also have regulations stating that assemblies cannot be held within a certain radius of buildings of the legislative, executive or judicial authorities. Such measures would also be contrary to the spirit of the Declaration (art. 6 (c)) if measures limiting the freedom of assembly are motivated by the desire to isolate human rights gatherings in order to prevent defenders from drawing public attention to the issues they are raising.

65. Defenders have reportedly been prosecuted under laws that allow the executive to arbitrarily ban public gatherings generally, or at specified locations. Farmers have been prosecuted in anti-terrorist courts for protesting attempts by State security forces to evict them from land; peace activists and anti-war protesters have been maligned and threatened with prosecution for defying travel restrictions; defenders have been charged with unlawful presence in a closed military zone when the area was in fact a civilian area with no military installations; and defenders participating in peaceful demonstrations have been charged with disrupting traffic and disturbing public order.

66. After regional consultations with defenders in the Middle East (see A/57/182), concern was expressed that the precedence often given to security considerations over human rights since 11 September 2001 has eroded the international system of human rights. The Special Representative is concerned at the apparent trend that legislation has become more restrictive and the policing of demonstrations become more violent, and that security considerations are used as the explicit pretext for adopting new legislation or harsher measures against defenders in many countries around the world. The worst affected by these new laws or regulations seem to be pro-democracy activists and those organizing or taking part in peaceful public action asserting their right to independence or self-determination.

67. In May 2001, a presidential decree was issued in Belarus, entitled "On certain measures to improve procedures for holding meetings, rallies, street processions, demonstrations and other mass actions and pickets". This decree imposed restrictions on the right to freedom of assembly, and it was reported at the time that under the decree, the body organizing an event could be held entirely responsible should public order be deemed to have been violated and could be fined or deregistered as a result.

68. During her official mission to Nigeria in 2005, defenders reported to the Special Representative that they were frequently prevented from holding rallies. The Public Order Act in Nigeria has been repeatedly used to deny permission for public gatherings. While the Special Representative recognizes the responsibility of a Government to preserve public order and peace, examples cited to her in this case and in cases from other countries indicate that refusal to grant permission is often arbitrary and not based on any reasonable apprehensions or justified by the facts and circumstances of the particular event.

69. After regional consultations with defenders' organizations, the Special Representative reported to the General Assembly in 2002 (ibid.) that the situation in several African countries was such that laws restricting freedom of assembly allowed Governments to treat peaceful assemblies as illegal and to use violence against human rights defenders exercising their right to protest against human rights violations. Although the material available to the Special Representative does not allow for an analysis of whether this situation has improved or worsened in different African countries, the Special Representative has seen an increase in administrative and legal restrictions on the right to freedom of assembly, in particular in Zimbabwe, during the past few years.

7. Particular challenges for vulnerable groups

70. Although all defenders are potentially vulnerable in situations where they are exercising their right to freedom of assembly, certain groups of defenders should be given particular attention and more effort should be focused on strengthening the protection of these groups.

71. The Special Representative has sent communications concerning defenders working specifically on the rights of lesbian, gay, bisexual and transgender (LGBT) persons who have had their right to peaceful assembly violated. In one case from India, the police, allegedly several times, barred defenders and LGBT persons from entering the office of an organization working on LGBT rights. In a case from Poland, an "Equality March" organized by LGBT defenders was banned by the authorities; however, the Special Representative was pleased to note that it was allowed the following year.

72. Women defenders often face more risks when participating in collective public action because of perceptions of the traditional role of women in some societies, and they become targets of non-State actors. Retaliation against them takes such forms as rape and sexual assault which can have adverse social consequences in addition to causing physical harm.

73. Women have been attacked and arrested for organizing a marathon for women in support of women's rights in Pakistan; they have been attacked, arrested and raped after organizing peaceful demonstrations and vigils in Zimbabwe; and women in Uzbekistan have been threatened by conservative religious groups and persons. In some of the cases, the alleged perpetrators were the authorities in the form of the police and/or the army. In several of the cases, the alleged perpetrators were non-State entities and even members of the women defenders' local community. In these cases the women defenders did not receive adequate protection from the State as guaranteed by article 12 of the Declaration.

8. The activities of defenders in conflict situations

74. As the Special Representative pointed out in her 2005 report to the General Assembly (A/60/339 and Corr.1), defenders fulfil a fundamental role in the preservation and restoration of peace and security. Defenders contribute to ending ongoing conflict, to preventing conflict from breaking out, and to peacebuilding in post-conflict situations. Defenders do this through several means, including demonstrations and vigils, meetings and conferences, dialogues and other forms of assemblies addressing human rights issues.

75. Human rights violations become more severe in situations of military governance or a resort to military means by the authorities as a response to security concerns. Freedom of assembly is one of the basic rights that will be particularly affected in such situations, as defenders who seek to assert the legitimacy of peaceful protest and the lawful exercise of the right to freedom of assembly are branded as subversive, threats to national security, or propagators of public disorder.

B. The right to freedom of assembly in international and regional treaties and declarations

76. The Declaration on Human Rights Defenders acknowledges the legitimacy of participation in peaceful activities to protest against violations of human rights, and recognizes freedom of assembly as a very important element of this right. Those engaged in such activities are entitled to effective protection under national law against any adverse action by the State. The right to freedom of assembly is vital for human rights defenders working locally, nationally and globally to promote and protect human rights. Article 5 of the Declaration states that "[f]or the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: (a) to meet or assemble peacefully ...." Exercising this right to assemble in order to promote and protect human rights, by protesting against public policy or State action, or by protesting actions by non-State groups and demanding protection by the State, is an effective mode of participation in a democracy.

77. At present, the right to freedom of assembly is not specifically covered by any particular thematic mandate under the Human Rights Council as is, for example, the right to freedom of expression. This is one of the reasons why the Special Representative has found it important to devote this report to the implementation of the Declaration in this area as this right is critical to the work and activities of defenders.

78. The right to freedom of assembly is protected by several international and regional treaties and conventions. Article 21 of the International Covenant on Civil and Political Rights (ICCPR) states: "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others." In addition, article 5 (d) (ix) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 15 of the Convention on the Rights of the Child, article 8 of the African Charter on the Rights and Welfare of the Child, article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, article 11 of the African Charter on Human and Peoples' Rights and article 15 of the American Convention on Human Rights all protect the right to freedom of assembly.

79. The right to freedom of assembly is also guaranteed by several declarations. Article 20 (1) of the Universal Declaration of Human Rights states: "Everyone has the right to freedom of peaceful assembly and association." This right is also protected by article 2 (5) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, article XXI of the American

Declaration of the Rights and Duties of Man, and the Charter of Paris for a New Europe, which affirms that, "without discrimination, every individual has the right to ... freedom of association and peaceful assembly...."

80. According to general comment No. 15 (1986) of the Human Rights Committee on the position of aliens under the Covenant, aliens do "receive the benefit of the right of peaceful assembly", indicating that not only citizens of the State have the right to freedom of assembly, but also foreign nationals and stateless persons.

1. Powers and responsibilities of States

81. In the preamble to the Declaration it is stressed that "the prime responsibility and duty to promote and protect human rights and fundamental freedoms lie with the State". States have a positive duty to actively protect assemblies that are lawful and peaceful, including protecting the participants against persons or groups that attempt to disrupt an assembly or carry out violent acts against the participants. This does not mean that, for instance, counter-demonstrations should not be allowed, but rather that it is the responsibility of the State to ensure that public order is maintained, and that participants are protected from violent attacks.

82. Article 12 (3) of the Declaration states that "everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms".

83. National law in several countries that restrict the right to freedom of assembly allows for action against defenders for activities that are protected by the Declaration, thus rendering interventions for the protection of defenders ineffective. Governments' reliance on national security laws when reacting to exposure or criticism of their human rights practices is one of the major factors threatening the safety of defenders and hampering their contribution to the promotion and protection of human rights nationally and internationally.

2. Powers and responsibilities of the police

84. Article 3 of the Code of Conduct for Law Enforcement Officials states: "Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty". In the commentary to this article it is pointed out that "[n]ational law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved".

85. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials deal with the policing of unlawful assemblies. Principle 12 states: "As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be

used only in accordance with principles 13 and 14." Principle 13 reads: "In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary." Principle 14 reads: "In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9." Principle 9 states: "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."

86. In a press release issued in 2003, the Special Representative urged the Bolivian authorities to ensure that law enforcement officials engaged in those operations carry out their duties in strict compliance with human rights standards, and in particular that, the strict limits on the use of lethal force, as stipulated under the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, are followed rigorously and without exception. In a press release concerning peaceful protests in India where police allegedly used indiscriminate force against the protestors, the Special Representative recommended that the allegations of indiscriminate and excessive use of force by the police against activists engaged in the protest should be properly investigated and action taken against the responsible officers, as appropriate.

87. In their responses to the communications from the Special Representative, Governments sometimes assure the Special Representative that investigations into violations of the right to freedom of assembly are being or will be investigated. In some cases the authorities have also informed the Special Representative that the perpetrators have been found guilty. In most of these cases, the perpetrators have been the police, and the outcome of the case has reportedly been either warnings, reprimands, or disciplinary penalties. Nevertheless, impunity for perpetrators of violence, attacks or threats to defenders in relation to violations of the freedom of peaceful assembly is widely practised

3. Reasonable restrictions

88. The preamble to the Declaration states that "the absence of international peace and security does not excuse non-compliance". Additionally, article 17 of the Declaration states: "In the exercise of the rights and freedoms referred to in the present Declaration, everyone, acting individually and in association with others, shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

89. Article 4 (1) of ICCPR states: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States

Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

90. In its general comment No. 29 (2001), the Human Rights Committee gives its general comments on article 4 of ICCPR on derogations during a state of emergency. Two fundamental conditions must be met before a State moves to invoke article 4: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. A fundamental requirement for any measures derogating from ICCPR, as set forth in article 4, is that such measures must be limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Further, article 4 (1) requires that no measure derogating from the provisions of ICCPR can be inconsistent with the State party's other obligations under international l , particularly the rules of international humanitarian law, and that States parties may in no circumstances invoke article 4 of ICCPR as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

4. New regional initiatives

91. The Special Representative has previously welcomed the creation of the Unit on Freedom of Association within the Office for Democratic Institutions and Human Rights (ODIHR) of OSCE. In March 2005, the Special Representative was invited to participate in a conference convened by OSCE/ODIHR in Almaty which focused on developing an adequate legal framework for freedom of association and assembly in Central Asia. One of the Special Representative's staff attended the conference, and the Special Representative has been continuously kept informed of further steps in the process including round-table discussions held in the first half of 2006 and the OSCE/ODIHR Guidelines for Drafting Laws pertaining to the Freedom of Assembly.

IV. Recommendations in conformity with the Declaration

92. **It is recommended that States keep in mind the importance of ensuring and maintaining the "contextual space" for the activities of human rights defenders. This includes the right to peaceful assembly, in combination with the rights entailed in relation to freedom of expression and association, all protected by articles 5, 6 and 7 of the Declaration. If States can ensure that this contextual space is protected, human rights defenders will have a good basis for contributing to the promotion and protection of human rights in the best national and international interests.**

93. **The Special Representative urges all States to review their legal framework with the aim of making sure that national legislation is in**

conformity with the Declaration and other international commitments and international standards relating to the right to freedom of assembly. It is important in this regard that a holistic approach be adopted, looking not only at freedom of assembly but also in the context of other fundamental human rights guaranteed by the Declaration and other human rights instruments, such as the right to freedom of association and the right to freedom of expression. In this regard, the Special Representative reminds States that article 2 (2) of the Declaration states that "[e]ach State shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the present Declaration are effectively guaranteed".

94. **In particular, the Special Representative is concerned about the use of national security legislation against defenders' right to freedom of assembly, and urges States to review restrictions imposed by laws and regulations on the right to freedom of assembly to make sure that they are in conformity with the obligations of the State under international human rights law, are necessary, and are always strictly relevant to the obligation of the State to protect.**

95. **The Special Representative is gravely concerned about information that travel restrictions are imposed on defenders for being deemed "security threats", "spies", or for "tarnishing the image of the country abroad". The Special Representative reminds States of the preamble to the Declaration which acknowledges "the important role of international cooperation for, and the valuable work of individuals, groups and associations in contributing to the effective elimination of all human rights and fundamental freedoms ...."**

96. **While recognizing that States can place restrictions on the right to freedom of assembly in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others, the Special Representative urges States to favour regimes of notification rather than authorization when it comes to defenders exercising their right to freedom of assembly. In cases where authorization is required for the holding of an assembly, the Special Representative urges States to make sure that authorization is given on the basis of national legislation that is in accordance with the principle of non-discrimination enshrined in ICCPR.**

97. **While recognizing that in order to be able to fulfil their responsibility to protect defenders participating in an assembly, the authorities need to be notified in advance, the Special Representative encourages States to consider in exceptional circumstances that defenders, with the aim of protesting human rights violations, should have the possibility of responding immediately to an event by holding public, peaceful assemblies.**

98. **In conformity with article 15 of the Declaration, the Special Representative urges States to ensure that law enforcement agencies and their members are trained in and aware of international human rights standards and international standards for the policing of peaceful assemblies, including the Declaration on Human Rights Defenders, the Code of Conduct for Law Enforcement Officials and other relevant treaties, declarations and guidelines. The Special Representative also advises all States that all allegations of indiscriminate and/or excessive use of force by law enforcement officials should be properly investigated and appropriate action taken against the responsible officials.**

99. **The Special Representative reminds States that according to the Declaration and its article 9 (2), everyone whose rights or freedoms have allegedly been violated has the right, either in person or through legally authorized representation, to complain and to have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay.**

100. **The Special Representative urges States to ensure that there are satisfactory review procedures for complaints in the event of restrictions being imposed on assemblies. Additionally, States are urged to ensure access to courts to appeal against any decision to restrict an assembly, although this should not be a replacement for satisfactory administrative review procedures for addressing such complaints from defenders.**

101. **The Special Representative reminds States of their responsibilities, according to article 12 (2) of the Declaration, to "take all necessary measures to ensure the protection by the competent authorities of everyone ... against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration". She urges States to fulfil their obligation to protect defenders and to ensure there is no impunity for harm inflicted on defenders who are carrying out collective public action.**